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D.R. Miller v. Paul Kaye, dba Shrine Circus : Reply Brief of Plaintiff/Appellant

Utah Supreme Court

Alan Fletcher; Parsons, Behle & Latimer; Attorneys for Defendant/Respondent.
Craig S. Cook; Worsley, Snow & Christensen; Attorneys for Plaintiff/Appellant.

13784

IN THE SUPREME COURT OF THE STATE OF UTAH

D. R. MILLER,

Plaintiff/Appellant,

vs. Case No. 13984

PAUL KAYE, dba
SHRINE CIRCUS,

Defendant/Respondent.

REPLY BRIEF OF PLAINTIFF/APPELLANT

Appeal from Judgment of the Third Judicial
District Court, Salt Lake County, State of Utah
The Honorable Stewart M. Hanson, Sr., Judge

CRAIG S. COOK of
WORSLEY, SNOW & CHRISTENSEN
700 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for Plaintiff/Appellant

ALAN FLETCHER of
PARSONS, BEHLE & LATIMER
79 South State Street
Salt Lake City, Utah 84111
Attorneys for Defendant/Respondent

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STATEMENT OF FACTS

Plaintiff believes that the facts are sufficiently clear from the court's own findings together with the corrections, objections, and additions argued by plaintiff. The statement of facts of defendant is not a true picture of the testimony of this case since it is written entirely from defendant's viewpoint. It also contains editorial opinions and conclusions as to why the parties acted as they did.

Plaintiff Miller would only comment that he has maintained throughout the pre-trial discovery, the trial and this appeal that Peggy was never sold to defendant at any time for any price. The overwhelming weight of the evidence supports this contention as explained in plaintiff's brief in chief and this reply brief. The actions of plaintiff, his records, business practices, and the testimony of his employees overwhelmingly support this contention and cannot be refuted by the "July letter" or ambiguous conduct of defendant.

ARGUMENT

A. The trial court failed to make any findings concerning an essential condition necessary for the application of § 70A-2-201(2), Utah Code Annotated.

As defendant admits in its brief, it is necessary for it to come within the exception of § 70A-2-201(2) if the alleged oral contract to sell Peggy is to be taken from the Statute of Frauds. Since the case was tried to the court without a jury, it was required that the court should "find the facts specially and state separately

its conclusions of law thereon." (Rule 52, Utah Rules of Civil Procedure). The trial court failed to make any finding concerning plaintiff's knowledge of the July letter contents and this failure requires, at the least, a remand to the lower court for further proceedings.

The court obviously found that plaintiff had received the letter and check. If the mere receipt of the letter was sufficient to bind a merchant, the words "and the party receiving it had reason to know its contents" would not have been added to § 201(2). Defendant attempts to explain away this requirement by stating, "It is inconceivable that anyone receiving that letter would not have reason to know the contents thereof." This is an interesting observation of defendant but is not a finding of the court. The actual physical receipt of the letter is not sufficient to bind the receiving merchant without knowledge of its contents. To hold otherwise, as stated in appellant's brief in chief, would make unnoticeable, concealed, or camouflaged confirming letters bind a receiving merchant to an alleged oral contract even

though he had no knowledge of the receipt of the document. It would automatically impute binding business decisions upon every mail clerk in a corporation regardless of other agency rules of law. It would prevent a party from being given the opportunity to "accept or reject" the terms of the confirming memoranda as to their exactness to the original oral contract.

There is no finding concerning the knowledge of plaintiff as to the contents of the letter. Defendant's speculation as to what the evidence should show or could show is irrelevant since it was incumbent upon the court to make a specific finding upon this essential element if the Statute of Frauds was to be disregarded. In Farmers and Merchants Bank v. Universal CIT Credit Corporation, 4 Utah 2d 155, 289 P.2d 1045 (1955), this court remanded that case to the trial court for its failure to make a specific finding as to the knowledge of a bank concerning available funds--the same element necessary in this case.

In addition, the trial court made no findings that the actions of Mr. Bowman could be imputed to that

of plaintiff. Defendant cites the evidence in the case and concludes, "Clearly, Mr. Bowman is plaintiff's highly trusted agent and receipt of the check and letter of July 11, 1973, by Mr. Bowman must be construed as receipt by Mr. Miller." (Respondent's Brief 16). This assertion by respondent is no substitution for an actual finding by the trial court when such finding is required to impute even the receipt of the letter to plaintiff. The question of agency is an important one in cases such as this because of the consequences which can occur to the principal for the agent's knowledge. As cited in Bender's Uniform Commercial Code Service quoted on Page 18 and 19 of respondent's brief, "Since the rule of subsection 2 applies only between merchants, the problems of agency are likely to occur, and imputation of an agent's knowledge to his principal will be a matter that might also arise under this particular criterion."

Thus, the question of imputation of knowledge to plaintiff, either directly or indirectly, is a question which cannot be left unanswered by the findings of the

trial court. For this reason, these questions must be remanded to the trial court for further proceedings if this court fails to grant a new trial or reverse as a matter of law on the other contentions raised by plaintiff.

B. The trial court erred in allowing parol testimony of the alleged sale of Peggy on July 8 or 9, 1973, which was inconsistent with the written telegram of April 28, 1973, and the court further erred in making inconsistent findings as to the oral agreement prior to the telegram and the telegram itself.

Defendant attempts to separate the April, 1973, dealings between the parties from the July, 1973, dealings. Defendant states:

> "It is true that, although the parties had discussed both purchase and lease of the elephant in the preliminary negotiations in April, 1973, the contract entered into by the parties contemplated only a lease of the elephant. This contract was confirmed by telegram . . . .
>
> "It makes little difference whether the parties subsequently modified the lease agreement to convert the same to a sale agreement or whether they agreed separately to a contract of sale. It has never been contended by the

defendant that he had an 'option' to purchase Peggy. . . . . Thus, the 'parol' evidence received by the court is not an attempted modification of the lease agreement of April, 1973, but is explanatory of the oral contract made on or about July 9, 1973, as confirmed by the letter of July 11, 1973." (Respondent's Brief at 20-21).

This statement of defendant goes directly against Finding No. 6 which states:

> "Both lease and sale of the animal were discussed and at the conclusion of the discussions, the parties determined that defendant would lease Peggy from plaintiff for a rental payment of $150.00 per week for fifteen out of the first twenty weeks of the lease and that should defendant subsequently determine Peggy to be satisfactory for defendant's uses, defendant could purchase Peggy and that the lease payments already made would be applied toward the purchase price." (emphasis added)

It goes against Finding No. 9:

> "Subsequently, on or about July 8 or 9, 1973, plaintiff and defendant had a telephone conversation wherein defendant told plaintiff that defendant considered Peggy to be satisfactory and that defendant desired to purchase Peggy as previously discussed and to apply the lease payments already made toward the $5,000.00 purchase price." (emphasis added)

From these findings, it is evident that the trial court considered the July sale to be a continuation of the original oral contract made between the parties in April. Defendant's assertion that these were two separate occurrances flies directly contrary to the findings of the court which were basically prepared by defendant's attorneys. Defendant is obviously caught in a dilemma since to support the findings of the trial court would bind defendant to the April 28, 1973, telegram which "memorialized" the April agreement but which made no mention of the option to purchase Peggy. (Finding No. 8).

If the evidence supports two separate agreements, as defendant now claims in its brief, the findings are clearly erroneous and not based upon the evidence. If, on the other hand, the findings are correct as to the continuation of the April agreement into July, there is an internal inconsistency as to the findings where the telegram failed to recognize this option and the testimony of the defendants in variance of this telegram should not have been allowed.

In either case, it is apparent that the findings are either not supported by the evidence or are internally inconsistent which cannot justify the judgment of the court.

C. The finding of the trial court that a "sale" of Peggy had been made by plaintiff, Miller, is clearly against the weight of the evidence.

Defendant complains that some of the errors mentioned by the plaintiff in its brief are "not ultimate facts" and, therefore, have no meaning. Plaintiff will concede that some of these facts are not crucial to the appeal, such as whether Peggy was 8 years old or 16 years old. It is apparent, however, that the trial court failed to make correct findings even on uncontroverted and easily understood facts. It is not hard to understand, therefore, why the court failed to correctly find facts on disputed matters, such as the receipt of the July letter.

In addition, defendant contends that plaintiff's claimed "omissions" are immaterial and do not go to any "ultimate facts necessary to determination of this case."

It is interesting to note that most of these undisputed omissions concern plaintiff's attempt to contact defendant about payment. These findings go directly to the trial court's conclusion, "It appears strange to the court that the plaintiff would allow the elephant in question to remain with the defendant for almost a year and then not make any move until he received the check for $2,950.00." (R. 63) (emphasis added). Certainly these facts are crucial in determining the weight of the evidence and the underlying reasoning of the trial court.

While the trier of fact is given broad discretion in judging the credibility of witnesses and determining facts, this prerogative is not entirely without limit. The trier of fact cannot be permitted to capriciously or arbitrarily reject credible evidence when there is no sound reason for doing so. Super Tire Market, Inc. v. Rollins, 18 Utah 2d 122, 417 P.2d 132 (1966). There is no logical or rational basis for failing to make findings concerning these uncontroverted events showing plaintiff's effort to contact defendant during the period in which the trial court stated, "no move" was made.

Likewise, the court erroneously equated the forgetfulness of plaintiff in remembering the Arkansas motel meeting with forgetting the receipt of the alleged confirmatory July letter. While defendant in his brief characterizes such meeting as "an entire line of discussions crucial to the issues at hand" such a characterization is entirely misplaced. Mr. Miller's statement, "I have never talked to Mr. Kaye in person in Arkansas in my life" is a far cry from the inferences made by defendant that plaintiff could not recall any conversations concerning the leasing of the elephant at any time. It should be noted that Mr. Miller voluntarily clarified his lapse of memory upon redirect examination. (R. 200).

Forgetting the place of the conversation is certainly no more severe than Mrs. Kaye's forgetfulness of her telephone conversation with Mr. King. For the trial court to conclude, "It is just as likely that he received a letter with a check of July 11 and forgot it or overlooked it as it was with his testimony in connection with the meeting in Little Rock" (R. 63) is equating apples with boxcars.

In the first instance, a particular place and time was forgotten; in the second instance, plaintiff would have had to forget the sale of the elephant, the total cost, the terms of the installment payments, together with the fact the balance would not have to be paid for one year. See Exhibit 1d. In addition, plaintiff would have had to have forgotten to tell Mr. Bowman, his accountant, of the sale since no changes were made on plaintiff's book concerning the status of the elephant. (R. 187-188).

An examination of the record and of the court's own findings of fact supplemented with those omitted by the court clearly show that the preponderance of evidence is in favor of plaintiff in his contention that no sale of Peggy occurred. Since it was defendant's burden of proving both an oral contract and an exception to the Statute of Frauds, the failure of defendant to do this requires reversal as a matter of law.

Respectfully submitted,

WORSLEY, SNOW & CHRISTENSEN

By: Craig S. Cook

Craig S. Cook
Attorneys for Plaintiff/Appellant